

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1338

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1338

UNITED STATES OF AMERICA,

Appellee,

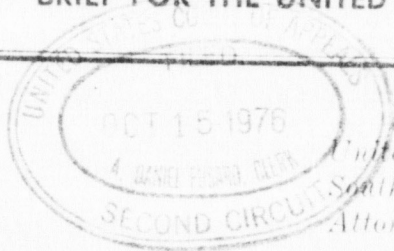
—v.—

ALAN GOTTFRIED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

SARAH S. GOLD,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

| | PAGE |
|--|------|
| Preliminary Statement | 1 |
| Statement of Facts | 2 |
| ARGUMENT: | |
| POINT I—The Constitutional Issue Raised Is Pre- mature | 3 |
| POINT II—The Delegation to the Attorney General Is Not Unconstitutional | 4 |
| CONCLUSION | 6 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|---|
| <i>California Bankers Association v. Schultz</i> , 416 U.S. 21 (1974) | 3 |
| <i>Iske v. United States</i> , 396 F.2d 28 (10th Cir. 1968) | 5 |
| <i>United States v. Baker</i> , 429 F.2d 1344 (7th Cir. 1970) | 5 |
| <i>United States v. Bronstein</i> , 521 F.2d 459 (2d Cir. 1975) | 1 |
| <i>United States v. Burke</i> , 517 F.2d 377 (2d Cir. 1975) | 1 |
| <i>United States v. DiLaura</i> , 394 F. Supp. 770 (D. Mass. 1974) | 3 |
| <i>United States v. Grimaud</i> , 220 U.S. 506 (1911) | 5 |
| <i>United States v. Howard</i> , 352 U.S. 212 (1957) | 5 |

| | PAGE |
|---|------|
| <i>United States v. Mattucci</i> , 502 F.2d 883 (6th Cir. 1974) | 5 |
| <i>United States v. Mullens</i> , — F.2d —, Slip op. 4257 (June 23, 1976) | 1 |
| <i>United States v. Pond</i> , 523 F.2d 210 (2d Cir. 1975) | 1 |
| <i>United States v. Rumely</i> , 345 U.S. 41 (1953) | 4 |
| <i>United States v. Smaldone</i> , 484 F.2d 311 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974) | 3 |
| <i>United States v. Vargas</i> , 380 F. Supp. 1162 (E.D. N.Y. 1974) | 5 |
| <i>United States v. Westlake</i> , 480 F.2d 1225 (5th Cir. 1973) | 4 |

OTHER AUTHORITIES

| | |
|----------------------------------|---------|
| 21 U.C.C. § 811 | 2, 3 |
| 21 U.S.C. § 812 | 3, 4, 5 |
| 21 U.S.C. § 841 | 4 |
| 21 U.S.C. § 841(a) (1) | 2, 3 |
| 21 U.S.C. § 841(b) (1) (A) | 2, 3 |

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UNITED STATES OF AMERICA,

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—v.—

ALAN GOTTFRIED,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alan Gottfried appeals from a judgment of conviction entered on June 3, 1976, in the United States District Court for the Southern District of New York, after a plea of guilty before the Honorable Lawrence W. Pierce, United States District Judge.*

Indictment 75 Cr. 1265, filed in five counts on December 31, 1975, charged Jaime Ernesto Diez, Alan Gott-

* Gottfried pleaded guilty subject to the express condition that he preserve for appeal to this court the denial of a motion to dismiss the indictment. This court has authorized this procedure. *United States v. Mullens*, — F.2d — slip op. 4257, 4358 (June 23, 1976); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States v. Pond*, 523 F.2d 210, 212 (2d Cir. 1975); *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

fried and Stuart Gottesman in Count One with conspiring to distribute, and possess with intent to distribute, cocaine, in violation of Title 21, United States Code, Section 846.* Counts Two through Five charged various of the defendants with the substantive crimes of actual distribution of, or possession of with intent to distribute, cocaine on various specific dates, all in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A). On June 3, 1976, Alan Gottfried pleaded guilty to Count One of the indictment.** On July 14, 1976, Judge Pierce suspended the imposition of sentence and Gottfried was placed on probation for a period of two years.

Statement of Facts

Prior to the plea in this case, Gottfried moved to dismiss the indictment on the ground that the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act") unconstitutionally delegates to the Attorney General of the United States the authority to classify controlled substances, 21 U.S.C. § 811, and thus to alter the penalty imposed upon conviction of their illegal sales. In an endorsement order, dated May 24, 1976, that motion was denied. That decision is the sole issue raised by Gottfried on appeal.

* Stuart Gottesman's case was transferred pursuant to Rule 20 of the Federal Rules of Criminal Procedure to the Central District of California. Jaime Ernesto Diez is a fugitive.

** The remaining two counts against Gottfried were dismissed at the time of his sentencing on July 14, 1976.

ARGUMENT

POINT I

The Constitutional Issue Raised Is Premature.

Gottfried contends that the statutory scheme of the Act, which delegates to the Attorney General of the United States the authority to add drugs to, or transfer drugs between, schedules, 21 U.S.C. § 811, constitutes an unconstitutional delegation of legislative power in violation of Article 1, Section 1 of the United States Constitution.* This claim is premature.

Gottfried pleaded guilty to participating in a conspiracy to distribute, and possess with intent to distribute, a Schedule II drug, cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). Cocaine hydrochloride was placed in Schedule II by Congress when the Act was first passed. 21 U.S.C. § 812. The authority delegated to the Attorney General to change drugs listed within any Schedule has never been exercised with respect to cocaine.

When legislative power has been delegated but not exercised, it is premature to raise the constitutionality of the powers delegated. See *California Bankers Association v. Schultz*, 416 U.S. 21, 53-54 (1974). In this posture, the court should exercise judicial restraint.

“Grave constitutional questions are matters properly to be decided by this Court but only when they

* Although appellant does not claim that classification of cocaine as a Schedule II drug was unreasonable, we note that the reasonableness of that classification has been upheld. See e.g., *United States v. Smaldone*, 484 F.2d 311 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974); *United States v. DiLaura*, 394 F. Supp. 770 (D. Mass. 1974).

inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power. . . ."

United States v. Rumely, 345 U.S. 41, 48 (1953).

The identical issue to the one before this court was raised and summarily rejected as premature in *United States v. Westlake*, 480 F.2d 1225 (5th Cir. 1973). The court in *Westlake* found that appellant "ha[d] not been affected by whatever delegation of authority may be embodied in the statute." 480 F.2d at 1226. The argument of Gottfried here must similarly be rejected.

POINT II

The Delegation to the Attorney General Is Not Unconstitutional.

Since Congress has delegated to the Attorney General the power to delete drugs from or transfer drugs between schedules, Gottfried argues that Congress has impermissibly delegated the power to define, and fix punishment for, crimes. Even if one were to assume that Gottfried has properly raised this issue, the claim is meritless.

In Section 841 of the Act, Congress made unlawful certain acts with respect to various controlled substances and set forth the maximum—and in some instances, the minimum—penalties for the commission of these acts. Controlled substances are listed in five schedules in Section 812. At the time of enactment, Congress set forth each controlled substance to be listed within each schedule. Congress further provided, for each schedule, detailed findings to be made for determining the placement of a drug or other substance within a given schedule. In addition, Congress enumerated, in Section 811, eight specific factors to be considered by the Attorney General in any

determination to change the placement of, or to remove, a controlled substance from a schedule as established by Congress.

Thus, contrary to the contention of Gottfried, Congress has legislatively determined both the various acts that constitute offenses under the Act and the penalties to be imposed for their violation. See *United States v. Mattucci*, 502 F.2d 883 (6th Cir. 1974). It is beyond question that Congress may provide criminal penalties for violations of rules and regulations that it has delegated to the executive branch of government to enact. *United States v. Grimaud*, 220 U.S. 506 (1911); *United States v. Vargas*, 380 F. Supp. 1162, 1167 (E.D.N.Y. 1974).

In delegating the regulation of drugs, Congress has often set broad standards of discretion that have been sustained by the courts. See *Iske v. United States*, 396 F.2d 28 (10th Cir. 1968). Once Congress has set forth a legislative policy, it "may properly delegate an executive duty to effectuate [that] policy." 396 F.2d at 32 citing *United States v. Howard*, 352 U.S. 212, 218-19 (1957).

In the instant Act, the Attorney General is delegated no more than the administrative task of regulating controlled substances within the five schedules in accordance with the standards fixed by Congress. See e.g., *Iske v. United States*, *supra*.^{*} Since the legislation itself specifi-

^{*} In *Iske*, appellant did not even challenge the authority of Congress to delegate the broad powers, but only the adequacy of the standards set by Congress to exercise that authority. Although Gottfried has not specifically challenged the adequacy of the standards set by Congress to determine which drug is to be placed in each schedule, it is nevertheless beyond question that the standards set forth in sections 811 and 812 are more than sufficient for a valid delegation of rule making authority to the Attorney General. See e.g., *United States v. Baker*, 429 F.2d 1344, 1347 (7th Cir. 1970); *Iske v. United States*, *supra*.

cally sets out the policies to be enforced, and the exact standards to be administered, such a delegation clearly does not constitute an unconstitutional delegation of legislative power.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

SARAH S. GOLD,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)

: ss.:

County of New York)

SARAH SCHIRANK GOLD being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 15th day of October
she served a copy of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

Frederick Cohn, Esq.
299 Broadway
New York, New York

And deponent further says that

mailing outside the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Sarah Schrank Gold

Sworn to before me this

15th day of OCTOBER, 1976

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977

BEST COPY AVAILABLE